Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as Amended by the Cable Television Consumer Protection and Competition Act of 1992	))))	MB Docket No. 05-311

REPLY COMMENTS OF THE STATE OF HAWAII

The State of Hawaii ("Hawaii" or "the State") provides these reply comments to express its support for the overwhelming majority of the comments that were filed in this proceeding opposing the Second Further Notice of Proposed Rulemaking's ("*Second FNPRM*") tentative conclusion that cable-related in-kind contributions are franchise fees for the purposes of the five percent cap. Hawaii also joins the many comments that oppose the Commission's proposal that these rules be applied to state franchising authorities. Throughout these reply comments, Hawaii addresses the comments of certain parties that appear to have misconceptions about the history of cable regulation and the structure of the Cable Act.

I. THE COMMISSION'S PROPOSED RULES CONTRADICT THE PLAIN TEXT OF THE CABLE ACT

In opposing the *Second FNPRM*, Hawaii concurs with the positions of such parties as the City of Philadelphia, *et al.* ("the City of Philadelphia"); the National Association of Telecommunications Officers and Advisors, *et al.* ("NATOA"); and Anne Arundel County, Maryland, *et al.* ("Anne Arundel County") that the proposed rules are contrary to the unambiguous language of the Cable Act. There is significant textual evidence throughout the relevant provisions of the Act that undermines the *Second FNPRM*'s reading of the statute. For example, as NATOA correctly observes, Section 622(c)(1) of the Cable Act explicitly allows for the inclusion of an itemized line on customer cable bills stating "[t]he amount of the total bill assessed as a franchise fee[,]" while Section 622(c)(2) provides for itemization of "[t]he amount of the total bill assessed to satisfy any requirements imposed on the cable operator by the franchise agreement to support public, educational, or governmental channels or the use of such channels." The fact that Congress provided for separate and independent itemization of franchise fees and franchise obligations demonstrates that franchise obligations are not franchise fees.[1]

Those comments filed in support of the *Second FNPRM*—including those filed by the American Cable Association ("ACA")—fail to recognize the plain textual evidence that franchise obligations are separate and distinct from franchise fees.[2] Instead, the ACA relies on other textual arguments to attempt to sustain the proposed rules, but none of its arguments are persuasive. For example, the ACA argues that the lack of a specific statutory exception exempting franchise obligations from franchise fees shows that these franchise obligations are franchise fees.[3] But this argument represents a fundamental misunderstanding of the structure of the Cable Act. The exceptions to the five percent cap enumerated in Section 622(g)(2) are designed to permit collection of certain kinds of fee payments that otherwise might be misinterpreted to fall within the cap. Cable-related in-kind contributions were not included in this list of exemptions because Congress never intended for them to be characterized as fees and included in the first place. And as Anne Arundel County correctly observes, the mere fact that something is not listed as an

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[1] *See* Comments of the National Association of Telecommunications Officers and Advisors, *et al.*, MB Docket No. 05-311, at 5-6 (Nov. 14, 2018) ("*Comments of NATOA*").

[2] *See, e.g.*, Comments of the American Cable Association, MB Docket No. 05-311, at 5 (Nov. 14, 2018) ("*Comments of the ACA*").

[3] *See id.* at 5-6.

exception to a franchise fee does not mean that it *is* a franchise fee.[4] Neither the plain language of the statute, nor common sense, supports the ACA's conclusion on this point.

II. CABLE INTERESTS WERE UNABLE TO SALVAGE THE COMMISSION'S FLAWED ATTEMPT TO EXCLUDE BUILD-OUT REQUIREMENTS FROM THE SWEEPING COVERAGE OF THE PROPOSED RULE

As Hawaii and others addressed in their comments, the *Second FNPRM* makes an unsuccessful attempt to distinguish certain types of obligations under the Cable Act (such as PEG and INET support) with other types of obligations (such as build-out requirements) in an effort to assert that the former qualify as franchise fees, while the latter do not. The *Second FNPRM* argued that build-out obligations are not franchise fees because they "are not specifically for the use or benefit of the LFA or any other entity designated by the LFA," and "may ultimately result in profit to the cable operator."[5]

Even the ACA recognized "the Commission's reasoning is flawed" in making this argument and offered in its comments a substitute rationalization.[6] Specifically, the ACA argues that build-out requirements are materially different from PEG capacity and INETs because build-out requirements relate directly to the Cable Act's requirement that cable service be made equally available to all consumers, regardless of income status.[7] Because build-out obligations fulfill this

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[4] *See* Comments of Anne Arundel County, Maryland, *et al.*, MB Docket No. 05-311, at 19 (Nov. 14, 2018) ("*Comments of Anne Arundel County*").

[5] *See Second FNPRM*, ¶ 21.

[6] *Comments of the ACA*, at 6.

[7] *See id.*, at 7-8.

statutory command—and are accordingly not undertaken on behalf of the franchising authority—the ACA asserts that they do not qualify as franchise fees.[8]

But under the ACA's proposed standard for assessing whether a given franchise obligation is a franchise fee, PEG capacity and INETs would also not qualify as franchise fees. Like build-out requirements, the provision of PEG capacity and INETs is statutorily authorized.[9] PEG capacity and INET requirements also directly relate to two of the Cable Act's express mandates: that cable systems "be responsive to the needs and interests of the local community," and that cable communications "provide the widest possible diversity of information sources and services to the public."[10] Thus, even under the ACA's proposed standard, PEG capacity and INETs cannot qualify as franchise fees because they are responsive to statutory commands and are not undertaken on behalf of franchising authorities.

III. THE LEGISLATIVE HISTORY OF THE PROVISIONS IN QUESTION CANNOT SUPPORT THE COMMISSION'S PROPOSED RULE

As Anne Arundel County, the City of Philadelphia, NATOA, and others correctly note in their comments, the legislative history of the Cable Act supports the textual provisions of the Act in undermining the Commission's proposal that cable-related in-kind contributions should qualify as franchise fees for the purposes of the five percent cap. If Congress had intended these franchise obligations to offset franchise fees, it would have said so, either in the text of the statute or at some

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[8] *See id.*

[9] *See* 47 U.S.C. § 531(b).

[10] *Id.* § 521(2), (4).

point throughout the congressional record. But there is not a single word—either in the text or the legislative history of the Cable Act—to support the Commission's proposal.[11]

In its comments, the NTCA summarily concludes that the legislative history supports the Commission's proposed rule, but this conclusion ignores significant aspects of the legislative record. In fact, the very same House Report that the *Second FNPRM* cites in support of its tentative conclusion—and that the ACA cites in support of its comments[12]—explicitly states that "Subsection 622(g)(2)(c) . . . defines as a franchise fee only monetary payments made by the cable operator and *does not* include as a 'fee' any franchise requirements for the provision of services, facilities or equipment."[13] The *Second FNPRM*'s proposal is therefore contrary to congressional intent, and the Commission should abandon it.

IV. THE PROPOSED RULES WILL HAVE SUBSTANTIAL NEGATIVE IMPACTS ON THE PUBLIC AND WILL UNJUSTLY ENRICH CABLE OPERATORS

Several parties have mischaracterized the negative effects the proposed rules will have on the public if adopted. For example, the ACA alleges that, if the proposed rule is not adopted, cable operators will either have to eat the costs of franchise obligations or pass them along to subscribers, thus harming the public interest.[14] And the NCTA similarly mischaracterizes the current regulatory landscape, warning that franchising authorities regularly attempt to circumvent the five

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[11] *See id.*, at 12.

[12] *See, e.g.*, *Comments of the ACA*, at 8 & n.23.

[13] H.R. Rep. No. 98-934, 65, 1984 U.S.C.C.A.N. 4655, 4702 [hereinafter "*House Report*"] (*emphasis added*); *See, e.g.*, *Second FNPRM* ¶ 20 (citing H.R. Rep. No. 98-934 for the conclusion that "treating all cable-related, in-kind contributions as 'franchise fees,' unless expressly excluded by the statute, would best effectuate the statutory purpose").

[14] *See Comments of the ACA*, at 9.

percent franchise fee cap by seeking unlimited in-kind exactions.[15] Neither of these comments, however, are accurate.

First, the marginal costs to cable operators of providing channel capacity for PEG programming and network capacity for INETs is nominal because it is almost entirely incorporated into its existing cable system and facilities. Further, the existence of local PEG programming produced within the community can provide a distinguishing factor for cable operators as compared to satellite-delivered or over-the-top programming options.

Second, the NCTA's concern that franchising authorities will abuse their discretion to impose franchise obligations is unfounded. As Anne Arundel County correctly observes, franchising authorities may not unreasonably refuse to grant a franchise, and upon renewal of a franchise agreement, a cable operator can show that its proposal is "reasonable."[16] There is therefore little risk that franchising authorities will impose unlimited or unreasonable franchise obligations on cable operators in the absence of the Commission's proposed rules.

Third, the public will suffer significant harm if the proposed rules are adopted. As both Hawaii and the NATOA observed in their comments, if the fair market value of every franchise obligation is included in the five percent franchise fee cap, franchising authorities will lose billions of dollars in fees[17]—fees that Congress authorized these franchising authorities to collect. As a result, franchising authorities will be forced to choose between eating these costs or eliminating

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[15] *See* Comments of the NCTA, MB Docket No. 05-311, at 42 (Nov. 14, 2018) ("*Comments of the NCTA*").

[16] *See Comments of Anne Arundel County*, at 21; 47 U.S.C. § 546.

[17] *See* Letter from Rick Chessen, Chief Legal Officer, Senior Vice President, Legal & Regulatory Affairs, NCTA – The Internet & Television Association, to Marlene H. Dortch, Secretary, FCC, at p.1 (June 11, 2018) (stating that cable operators are collectively paying about $3 billion annually in franchise fees to state and local governments).

the franchise obligations all-together. This latter choice would have a significant impact on PEG operators, because some PEG stations are entirely—or at least substantially—funded by franchise fees.[18] As detailed in Hawaii's comments, PEG programming is crucial for ensuring that insular communities receive vital governmental information, but if the Commission adopts these proposed rules, most franchising authorities across the country will no longer be able to provide this public service to their residents.[19]

V. THE COMMISSION SHOULD NOT IMPOSE ITS TENTATIVE CONCLUSIONS ON STATE-LEVEL FRANCHISING AUTHORITIES

Hawaii joins with the City of Philadelphia in urging the Commission to refrain from applying the *Second FNPRM*'s proposals to state-level franchising authorities because doing so would undermine the federalist scheme of the Cable Act. As the City of Philadelphia correctly observes, state level franchising authorities are closer to the issues at hand in their states and are more conservative administrators of their own resources. State level franchising authorities are thus able to promote competition that benefits consumers in a way that the Commission cannot achieve through national regulation.[20]

Congress explicitly vested state governments with the authority to regulate cable franchises, and an increasing number of states have accordingly created statewide franchise authorities because of the efficiencies that state-level regulation provides.[21] As Anne Arundel

[18] *See Comments of the NATOA*, at 10.

[19] *See* Comments of the State of Hawaii, MB Docket No. 05-311, at 15 n.34 (Nov. 14, 2018) ("*Comments of the State of Hawaii*").

[20] *See* Comments of the City of Philadelphia, MB Docket No. 05-311, at 52 (Nov. 14, 2018) ("*Comments of the City of Philadelphia*").

[21] *See Comments of the State of Hawaii*, at 15.

County aptly observes, there is significant diversity among state franchising regulations such that it would be impossible for the Commission to fully appreciate how the *Second FNPRM* would apply to different state statutes without, at the very least, issuing a further notice on this topic.[22] It is therefore imperative that the Commission reject the *Second FNPRM*'s quasi-legislative attempt to federalize the state franchising process.

VI. CONCLUSION

As further detailed in its comments in this proceeding, Hawaii opposes the Commission's tentative conclusion that cable-related in-kind contributions are franchise fees as well as its proposal that the *Second FNPRM*'s proposed rules apply to statewide franchising authorities. Because these proposed rules violate the plain text and legislative history of the Cable Act, would result in a windfall for cable operators at the expense of the public, and would frustrate the principles of federalism that have been a hallmark of cable regulation, Hawaii respectfully requests that the Commission reject the rules proposed by the *Second FNPRM*.

Respectfully submitted,

THE STATE OF HAWAII

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[22] *See Comments of Anne Arundel County*, at 47-48.